2000 - 2002 RULES CYCLE

REPORT OF THE

NEW JERSEY SUPREME COURT

COMMITTEE ON

COMPLEMENTARY DISPUTE

RESOLUTION

January 15, 2002

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INTRODUCTION

The Supreme Court Committee on Complementary Dispute Resolution, appointed in August of 1990, continues to provide guidance for the development of CDR programs throughout the judicial system of the State of New Jersey. During the 1998-2000 Rules cycle, the Committee developed proposed standards for mediators in court-connected programs that were approved by the Supreme Court in January of 2000. The Committee also substantially revised the CDR Rules to reflect CDR's growth and development in New Jersey since the CDR Rules were first promulgated in 1992. As a result of that major revision, the number of proposed rule revisions in this report of the 2000-2002 Rules cycle is minimal. This report sets forth those proposed rule changes and provides a summary of the significant non-rule activities of the Committee.

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I. PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendment to Rule 1:40 - 11. Non-Court Dispute Resolution

The Committee recommends amending the approval process for referring a matter to a non-court administered dispute resolution process to allow the Assignment Judge, at his or her discretion, to designate another person, such as a Presiding Judge, to approve such referrals. The ultimate authority for such approval, however, would remain with the Assignment Judge. The Committee also recommends changing the word "program" to "process", recognizing that such referrals are usually to a process rather than a formal program.

1:40–11. Non-Court Dispute Resolution

With the approval of the Assignment Judge or his or her designee, the court, while retaining jurisdiction, may refer a matter to a non-court administered dispute resolution [program] process not subject to these rules or guidelines. The Assignment Judge or his or her designee may approve such referral upon the finding that it will not prejudice the interests of the parties.

Note: Adopted July 14, 1992 as Rule 1:40-9 to be effective September 1, 1992; redesignated as Rule 1:40-11 July 5, 2000 to be effective September 5, 2000; amended to be effective .

B. Proposed Amendment to Rule 1:40-12. Guidelines Governing the Qualifications and Training Requirements for Court Mediators

The Committee recommends changes to the requirements for mediators to be newly admitted to the Civil, General Equity and Probate roster. The first recommended change is to require that mediation experience for persons with an undergraduate degree must involve cases otherwise cognizable in the Superior Court. The second recommended change would require that applicants to the roster complete 35 classroom hours of basic mediation skills and at least five hours of co-mediation with an experienced mediator on the roster in at least two cases in the Superior Court. That change would bring the training requirement in line with that of most states, which require 40 hours of total training. Rather than requiring 40 hours of classroom training, however, the Committee believes it important that five of those total 40 hours be spent in co-mediation. Individuals already on the roster would not have to satisfy this new requirement.

1:40–12. Qualification and Training of Mediators and Arbitrators

(a) Mediator Qualifications.

(1) ...no change.

(2) ...no change.

(3) Civil, General Equity, and Probate Action Mediators. Mediator applicants for civil, general equity, and probate actions shall have at least five years of professional experience in the field of their expertise, as well as either an advanced degree or an undergraduate degree, coupled in both cases with mediation experience. For purposes of this rule, an advanced degree means a juris doctor or equivalent; an advanced degree in business, finance, or accounting, an advanced degree in the field of expertise in which the applicant will practice mediation, for example, engineering, architecture, or mental health; or state licensure in the field of expertise, for example, certified public accountant, architect, or engineer. For purposes of this rule, mediation experience which, together with an advanced degree, will qualify an applicant means evidence of successful mediation of a minimum of two cases within the last year, provided however that mediation experience is waived if mediation training was completed within the last five years. For purposes of this rule, mediation experience which, together with an undergraduate degree, will qualify an applicant means evidence of successful mediation of a minimum of ten cases involving subject matter otherwise cognizable in the Superior Court within the last five years.

(4) ...no change.

(5) ...no change.

(b) Mediator Training Requirements.

(1) General Provisions. Unless waived pursuant to subparagraph (2), all persons serving as mediators shall have completed the basic dispute resolution training course as prescribed by these rules and approved by the Administrative Office of the Courts as follows: mediators on the civil, general equity, and probate roster of the Superior Court, volunteer mediators in the Special Civil Part, and Municipal Court mediators shall have completed 18 classroom hours of basic mediation skills complying with the requirements of subparagraph (4) of this rule. Mediators on the civil, general equity and probate roster of the Superior Court shall have completed 35 classroom hours of basic mediation skills complying with the requirements of subparagraph (4) of this rule and at least five hours spent co-mediating with an experienced mediator on the roster in at least two cases in the Superior Court; Family Part mediators shall have completed a 40-hour training program complying with the requirements of subparagraph (5) of this rule; and judicial law clerks shall have successfully completed 12 classroom hours of basic mediation skills complying with the requirements of subparagraph (6) of this rule.

(2) ...no change.

(3) ...no change.

(4) Mediation Course Content — Basic Skills. The 18-hour classroom course in basic mediation skills shall, by lectures, demonstrations, exercises and role plays, teach the skills necessary for mediation practice, including but not limited to conflict management, communication and negotiation skills, the mediation process, and addressing problems encountered in mediation. The 35-hour classroom course in basic mediation skills for civil, general equity and probate cases shall have additional exercises and role plays.

(5) ...no change.

(6) ...no change.

(7) ...no change.

(c) ...no change.

(d) ...no change.

Note: Adopted July 14, 1992 as Rule 1:40-10 to be effective September 1, 1992; caption amended, former text redesignated as paragraphs (a) and (b), paragraphs (a)3.1 and (b)4.1 amended June 28, 1996 to be effective September 1, 1996; redesignated as Rule 1:40-12, caption amended and first sentence deleted, paragraph (a)1.1 amended and redesignated as paragraph (a)(1), paragraph (a)2.1 amended and redesignated as paragraph (a)(2), paragraph (a)2.2 amended and redesignated as paragraph (b)(5), new paragraphs (a)(3) and (a)(4) adopted, paragraph (a)3.1 redesignated as paragraph (a)(5), paragraph (a)3.2 amended and incorporated in paragraph (b)(1), paragraph (a)4.1 amended and redesignated as paragraph (b)(6), paragraph (b)1.1 amended and redesignated as paragraph (b)(1), paragraphs (b)2.1 and (b)3.1 amended and redesignated as paragraphs (b)(2) and (b)(3), paragraph (b)4.1 redesignated as paragraph (b)(4) with caption amended, paragraph (b)5.1 amended and redesignated as paragraph (b)(7) with caption amended, new section (c) adopted, and paragraph (b)5.1(d) amended and redesignated as new section (d) with caption amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(3); (b)(1); and (b)(4) amended to be effective .

II. PROPOSED RULE AMENDMENTS CONSIDERED AND REJECTED

There were no specific rule amendments considered and rejected by the Committee.

III. OTHER RECOMMENDATIONS

The Committee has made no other recommendations during this Rules cycle.

IV. LEGISLATION

The Committee has made no recommendations regarding legislation.

V. MATTERS HELD FOR CONSIDERATION

A. Municipal Court Mediation Matters

As the final changes were being made to the 1998-2000 Rules Report, a need was identified to refine the language of both Municipal Court Rule 7:8-1 and CDR Rule 1:40-8 to adequately reflect both the pre-complaint referral to mediation (Notice in Lieu of Complaint) and the post-complaint referral to mediation. Included in this discussion was a question posed concerning whether information written down on an intake sheet as part of an informal complaint is public information, or if it is protected by the confidentiality provision of 1:40-4.

During the 2000-2002 Rules cycle the Municipal Programs Subcommittee began this work in conjunction with the Conference of Municipal Presiding Judges and the Conference of Municipal Division Managers. The two conferences developed and distributed a mediation survey to all municipal court judges, court administrators, and others such as CDR Coordinators who are involved with oversight of municipal mediation programs. The survey was developed to gather information about how various courts run their programs, and to identify best practices so that standards could be developed for statewide operation. The survey also inquired about which case types are most adaptable to mediation. Based on the work of the conferences, the Municipal Programs Subcommittee will then be working with the Supreme Court Municipal Practice Committee to refine the language of the Rules to conform with and set forth actual mediation referral practice. Information from the survey also will be helpful to the Municipal Programs Subcommittee in its continuing work to develop a recommended presumptive mediation pilot program for selected municipal court case types.

B. Immunity for Mediators

In 1990, the Task Force on Dispute Resolution took the position that immunity should not be provided for dispute resolution practitioners in non-adjudicatory programs, but that the issue should be studied further when appropriate guidelines and standards have been developed for those practitioners. With the expansion of mediation, the creation of rosters of approved mediators for court connected programs, and the development of standards for mediators in those programs, the Vicinage Comprehensive Justice Programs Subcommittee is now in the process of that further review.

During the 2000-2002 Rules cycle, the Subcommittee reviewed court rules and statutes from the few states that provide immunity for neutrals, including language in New Jersey statutes addressing immunity for judicial personnel. The Subcommittee also reviewed the Uniform Mediation Act which, in its original draft form, had addressed the issue of immunity for mediators. Unfortunately, when the Act was approved in August 2001 specific language and guidance regarding immunity for mediators was not included. The Subcommittee now is in the process of determining the most appropriate language to use regarding immunity for mediators before making any recommendation to the full Committee.

C. Standards for Outside Providers Receiving Referrals from the Judiciary

One of the charges to the Vicinage Comprehensive Justice Programs Subcommittee from the Committee has been to determine appropriate guidelines or standards for the referral of cases to non-court administered dispute resolution programs under Rule 1:40-11. This includes development of both a policy and guidelines to handle solicitations from private providers, and standards to address quality of service and cost effectiveness.

During the 2000-2002 Rules cycle, the Subcommittee began this work by examining procedures that have been followed by the Administrative Office of the Courts as required in Rule 1:40-12(d) in its review and approval of institutions and agencies that provide mediation training. During the next rules cycle the Subcommittee will complete that review of existing material, including any procedures in place in other states, and develop recommended guidelines to be followed by the Judiciary when outside agencies and private providers request approval to receive referrals from the court.

VI. MISCELLANEOUS MATTERS

A. Family Economic Mediation Pilot

In 1998 the Supreme Court approved a six-county two-year pilot program to test mediation of the economic aspects of matrimonial cases. The program began July 1, 1999. In three of the counties -- Union, Burlington and Atlantic -- the cases were to be referred to mediation prior to proceedings before the Matrimonial Early Settlement Panel (MESP). In three other counties -- Bergen, Somerset and Morris -- the cases were to be referred to mediation after the referral to MESP, if the MESP does not resolve the matter. In monitoring the implementation of the program, the Committee was concerned about the low number of referrals in two of the three pre-MESP counties and therefore recommended to the Court that a seventh county, Ocean, be added to refer cases both pre- and post-MESP, and that the end date be extended from June 30, 2001 to December 31, 2001. In March 2001 the Court approved the Committee's recommendation and the program became operational in Ocean in March, 2001. At its October 23, 2001 meeting, the Committee considered an interim evaluation of the pilot program that continued to show a low number of cases being referred in the pre-MESP counties and a lower rate of settlement in those counties compared to the post-MESP counties. In addition to the statistical evidence, the Committee also considered anecdotal evidence from the judges and staff in the pre-MESP counties about the difficulties encountered in referring cases to the program pre-MESP. Some of the problems encountered by the pre-MESP counties included (a) a fairly high level of staff and judicial resources required to determine which cases are appropriate for referral, and (b) attorney resistance in the form of complaints at not having completed sufficient discovery to be able to mediate. The Committee therefore recommended, and the Supreme Court approved, converting the three pre-MESP counties to post-MESP, with the understanding that in all seven of the pilot counties parties may

voluntarily request mediation at any time. That change was effective January 1, 2002. At the same time the pilot was further extended through August 31, 2002. The Court also approved necessary changes to Appendix XIX of the Court Rules, "Guidelines for Pilot Program" to reflect overall change of the pilot to Post-MESP referral.

B. Presumptive Mediation Pilot for Civil Cases

In 1999 The Supreme Court approved a pilot program in three counties for the presumptive referral of a number of Civil case types to mediation at the earliest time when enough information is available to the parties so that there can be meaningful discussion towards resolution. Members of the Civil/Special Civil Programs Subcommittee, working with staff, identified pilot counties as Hudson, Mercer, and Union. A fourth, Gloucester, was added with the approval of the Chief Justice. The Subcommittee also developed pilot procedures that all four county participants could agree upon.

Program implementation began in early January, 2000, but proceeded piecemeal both because no automated process was in place to identify cases and to generate necessary orders and other materials, and because of limited staffing. Since the automated process took effect in June, 2001 the number of referrals to the pilot has increased dramatically. Also in June, 2001 the Supreme Court approved the addition of Cumberland and Salem Counties to the pilot, thereby expanding the Gloucester program to the entire vicinage.

During the 2000-2002 rules cycle the Civil/Special Civil Programs Subcommittee continued its work with the Marie L. Garibaldi ADR Inn of Court, the Dispute Resolution Section of the Bar and

ICLE to provide both the 18-hour mediation training program and the 4-hour continuing education programs required under Rule 1:40-12. The Subcommittee is also working with staff in the monitoring and evaluation of the program.

C. Standards of Conduct for Mediators in Court-Connected Programs

On January 4th, 2000 the Supreme Court adopted Standards of Conduct for Mediators in Court-Connected Programs. Those standards had been proposed by the Committee, published for comment during August - September of 1999, revised based on some comments, and submitted to the Court for final action. The Standards cover the following topics: Principle of Self-Determination; Impartiality; Conflicts of Interest; Competence; Confidentiality; Quality of the Process; and Fees for Service.

An Advisory Committee on Mediator Standards (Advisory Committee) was appointed by the Court from among members of the CDR Committee to assist those mediators seeking advice on how the standards should be interpreted. That Committee also was given responsibility to monitor any complaints filed against mediators and determine whether a more formal complaint process should be developed. Since the Standards were adopted, a total of four inquiries and one complaint were received and reviewed by the Advisory Committee. The first inquiry raised issue concerning whether a mediator would be breaching confidentiality by providing the court with information regarding a partial agreement as required by an Order used in the Family Economic Mediation Pilot. The Advisory Committee concluded that no breach of confidentiality would occur, stating that the Standards allowed the mediator to inform the court "whether the case has been resolved in whole or in part". The second inquiry involved general questions regarding language in the Standards.

The Advisory Committee instructed staff to contact the mediator and in that discussion all issues were resolved without further intervention. The third inquiry asked for clarification regarding Conflicts of Interest, specifically whether restrictions on "other professionals in one's firm/office" pertained to a firm's offices in New Jersey, or throughout the country. The Advisory Committee concluded that the restrictions include professionals in a mediator's firm/office on a worldwide basis. The fourth inquiry also involved a question regarding Conflicts of Interest, asking for guidance as to how an attorney/mediator in a county's Special Civil Part Mediation Program would know of any potential conflicts concerning disputants since cases were referred on the day of mediation. The Advisory Committee concluded that the neutrals used in this particular program actually were conducting settlement conferences and therefore were not bound by the Standards.

The only complaint received by the Advisory Committee involved the issue of a mediator's fees and whether the mediation session was prolonged solely for the purpose of billable hours. The fee issue was resolved by the local bar professionalism committee. However, other issues raised in the complaint are still under review by the Advisory Committee.

D. Collaborative Efforts with the Bar

The Committee continues to benefit from extensive discussion of CDR issues among the members of the Judiciary, the bar and the dispute resolution community. The ICLE mediation training noted above is an excellent example of the result of collaborative efforts, expanded during this rules cycle to include provision of the 40 hours of mediation training required for Family mediators and the required 4-hour continuing education program.

Committee members and staff have participated in providing the ICLE training, and in meetings of the Dispute Resolution Section of the State Bar, and ICLE's annual ADR Days held in cooperation with the Dispute Resolution Section, the New Jersey Association of Professional Mediators, and other professional groups. The Committee looks forward to continued support, input and collaboration with the organized bar in its on-going work to guide the development of CDR in New Jersey.

Respectfully Submitted,

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